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267 NLRB No. 12

D--9841
Plattsburgh, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BOUYEA BAKING CO., INC.

and

Case 3--CA--11397

LOCAL 50, BAKERY, CONFECTIONERY
& TOBACCO WORKERS UNION,
AFL--CIO

DECISION AND ORDER

Upon a charge filed on 17 January 1983 by Local 50, Bakery, Confectionery & Tobacco Workers Union, AFL--CIO, herein called the Union, and duly served on Bouyea Baking Co., Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint on 7 February 1983 against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on 16 December 1982, following a Board

election in Case 3--RC--8268, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about 7 January 1983, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On 16 February 1983 Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and raising certain 'affirmative defenses.'

On 7 March 1983 counsel for the General Counsel filed directly with the Board a 'Motion To Strike Respondent's Affirmative Defenses and for Summary Judgment.' Subsequently, on 10 March 1983, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

¹ Official notice is taken of the record in the representation proceeding, Case 3--RC--8268, as the term 'record' is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition to the Motion for Summary Judgment, Respondent admits the request and its refusal to bargain with the Union, but asserts that the Union was certified improperly. Respondent reiterates its contention in the underlying representation proceeding that the Regional Director acted wrongly and contrary to law by sustaining the Union's challenge to the determinative ballot of employee Kevin Pecore and further contends that it was denied due process of law by the Regional Director's refusal to direct a hearing concerning Pecore's voting eligibility.

Review of the record herein reveals that in Case 3--RC--8268 the petition was filed by the Union on 23 April 1982. On 8 June 1982, after a hearing, the Acting Regional Director issued his Decision and Direction of Election. Thereafter, on 9 July 1982, an election by secret ballot was conducted in the unit found appropriate by the Acting Regional Director. At the conclusion of the balloting, the tally revealed that 13 votes were cast for, and 12 against, the Union. There were two challenged ballots, a sufficient number to affect the results. One ballot, that of Warren Breyette, was challenged by the Employer on the ground that the employee was not employed within the unit as of the date of the election. The second ballot, that of Pecore, was

challenged by the Union on the grounds that Pecore's name had been added to the voter eligibility list without its agreement and that he was not employed in the bargaining unit on the voting eligibility date.

Following an investigation, the Regional Director recommended that both challenges be sustained. With respect to Pecore's eligibility,² the Regional Director found that as of the eligibility date Pecore was not employed within the voting unit, but rather was employed in a different job outside the unit. The Regional Director further found that, while Pecore was in training for a unit position as of the eligibility date, any functions Pecore performed as of that date in such training were on a voluntary basis, without compensation, and that he was not, therefore, on the Employer's payroll in a unit position as of the eligibility date. Accordingly, as the Union had received a majority of the valid ballots cast in the election, the Regional Director further recommended that a certification of representative issue.

Thereafter, Respondent filed timely exceptions to the Regional Director's Report on Challenged Ballots in which it reiterated the arguments previously rejected by the Regional Director. On 16 December 1982 the Board issued a Decision and Certification of Representative ³ in which it adopted the

² The voting eligibility of Warren Breyette is not at issue in this proceeding.

³ Not published in bound volumes of Board Decisions.

Regional Director's findings and recommendations, and certified the Union as the exclusive representative of the unit found appropriate.

Following a request by the Union on or about 22 December 1982 that Respondent engage in collective-bargaining negotiations with the Union, Respondent, on or about 7 January 1983, refused to recognize and bargain in good faith with the Union as the exclusive bargaining representative of its employees in the certified unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁴

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.⁵

⁴ See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁵ The General Counsel's motion to strike Respondent's "affirmative defenses" is hereby denied. While (continued)

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent is a New York corporation engaged in the production and sale of baked goods from its principal office and place of business at 6 Riley Avenue, Plattsburgh, New York. In the course of its business operations within the State of New York, Respondent annually purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 50, Bakery, Confectionery & Tobacco Workers Union, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

⁵ we find Respondent's affirmative defenses to be without merit, there is no reason to strike them.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All maintenance employees of the Respondent at its Riley Avenue, Plattsburgh, New York location, including maintenance employees, sanitation employees, receiving employees, order board employees, and thrift store employees but excluding production and shipping employees, tractor-trailer drivers, driver-salesmen, office clerical employees, guards and supervisors as defined in the Act.

2. The certification

On 9 July 1982 a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 3, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on 16 December 1982 and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about 22 December 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about 7 January 1983, and continuing at all times thereafter to date, Respondent has refused, and continues

to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since 7 January 1983, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining

agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Bouyea Baking Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 50, Bakery, Confectionery & Tobacco Workers Union, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All maintenance employees of the Respondent at its Riley Avenue, Plattsburgh, New York location, including maintenance employees, sanitation employees, receiving employees, order board employees, and thrift store employees but excluding production and shipping employees, tractor-trailer drivers, driver-salesmen, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 16 December 1982 the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about 7 January 1983, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Bouyea Baking Co., Inc., Plattsburgh, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 50, Bakery, Confectionery & Tobacco Workers Union, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All maintenance employees of the Respondent at its Riley Avenue, Plattsburgh, New York location, including maintenance employees, sanitation employees, receiving employees, order board employees, and thrift store employees but excluding production and shipping employees, tractor-trailer drivers, driver-salesmen, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Riley Avenue, Plattsburgh, New York, facility copies of the attached notice marked "'Appendix.'"⁶ Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where

notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

8 August 1983

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 50, Bakery, Confectionery & Tobacco Workers Union, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All maintenance employees of the Employer at its Riley Avenue, Plattsburgh, New York location, including maintenance employees, sanitation employees, receiving employees, order board employees, and thrift store employees but excluding production and shipping employees, tractor-trailer drivers, driver-salesmen, office clerical employees, guards and supervisors as defined in the Act.

BOUYEA BAKING CO., INC.

(Employer)

Dated ----- By -----
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 901, 111 West Huron Street, Buffalo, New York 14202, Telephone 716--846--4951.